

**E-FILED on** 9/30/2008

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

In re CONSECO INSURANCE CO.  
ANNUITY MARKETING & SALES  
PRACTICES LITIG.,

No. C-05-04726 RMW

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This document relates to:

ORDER RE DEFENDANTS' MOTION TO  
DISMISS SECOND AMENDED  
COMPLAINT

ALL ACTIONS

**[Re Docket No. 103]**

The operative complaint, the Second Amended Consolidated Class Action Complaint ("SAC"), has been filed by plaintiff Robert H. Hansen ("Hansen") against the following five defendants: Consecos Insurance Company ("CIC"), Consecos, Inc. ("Consecos"), Consecos Services LLC ("Consecos Services"), Consecos Marketing LLC ("Consecos Marketing"), and 40/86 Advisors, Inc. ("40/86"). Two defendants, Consecos and 40/86, move to dismiss the second amended complaint for lack of personal jurisdiction; four defendants, Consecos, 40/86, Consecos Services and Consecos Marketing, move to dismiss all causes of action for failure to state a claim. For the reasons set forth below, the court grants the motion of Consecos and 40/86 to dismiss for lack of personal jurisdiction and denies the remaining defendants' motion to dismiss for failure to state a claim as to all claims except plaintiff's breach of fiduciary duty and aiding and abetting the breach of fiduciary duty claims. Those two fiduciary duty claims are dismissed with prejudice.

**I. BACKGROUND****A. Procedural Background**

The operative complaint, the SAC, was filed after this court granted in part and denied in part the motion to dismiss the previous operative complaint, styled as a "Consolidated and Amended Class Action Complaint"<sup>1</sup> ("CACAC"), by order dated February 12, 2007 ("Order"). The SAC adds four defendants in addition to the originally-named defendant CIC: Conseco, 40/86, Conseco Services and Conseco Marketing (collectively "Moving Defendants"). The SAC also drops one of the two named plaintiffs, Friou Jones, leaving Robert H. Hansen as the sole named plaintiff. The SAC includes ten enumerated claims: (1) two RICO claims, one each under 18 U.S.C. § 1962(c) and (d); (2) an elder abuse claim under Cal. Welf. & Inst. Code § 15600 *et seq.*; (3) a UCL claim under Cal. Bus. & Prof. Code § 17200 *et seq.*; (4) a false advertising claim under Cal. Bus. & Prof. Code § 17500 *et seq.*; (5) a breach of fiduciary duty claim; (6) an aiding and abetting breach of fiduciary duty claim; (7) a fraudulent concealment claim; (8) a claim for breach of the duty of good faith and fair dealing; and (9) a claim for unjust enrichment and imposition of a collective trust.

CIC previously moved to dismiss the SAC for failure to state a claim. The court granted the motion only as to plaintiff's claims for breach of fiduciary duty and for aiding and abetting breach of fiduciary duty. The court gave plaintiff 20 days to amend but plaintiff chose not to amend those two claims.<sup>2</sup>

The Moving Defendants, the four added defendants in the SAC, bring the current motion.

**B. Factual Background**

The following facts are taken from the SAC and are assumed to be true for the purposes of the present motion to dismiss. In March 2000, plaintiff purchased from sales agent Robert Zehner a "Conseco Choice equity-indexed annuity" issued by CIC ("the CIC annuity"). Plaintiff financed the purchase by selling an annuity issued by another company. Plaintiff was sixty-eight years old when

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<sup>1</sup> No class has been certified under Rule 23.

<sup>2</sup> In their motion, Moving Defendants again seek dismissal of plaintiff's claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty. Plaintiff presents no opposing argument as to these claims.

1 he purchased his CIC annuity. Plaintiff's CIC annuity had a maturity date of 2027. It gave Hansen  
 2 the option to reset the maturity date, but the maturity date could only be reset after the expiration of  
 3 the surrender charge period on the annuity, which was allegedly fifteen years. Both the original  
 4 maturity date and the surrender charge period allegedly extend beyond Hansen's actuarialized life  
 5 expectancy. The CIC annuity also imposed a surrender charge of 20% for the first five contract  
 6 years. Plaintiff cashed out of his annuity in 2004 and alleges that after paying this 20% surrender  
 7 charge, he suffered a return of negative 4.09% on his investment.

8 CIC sells annuities and, according to plaintiff, along with Moving Defendants Consecos,  
 9 Consecos Services, Consecos Marketing and 40/86, engages in a wide variety of unsavory practices  
 10 when marketing annuities to persons sixty-five years of age and older. CIC and its sales agents  
 11 allegedly purposefully misrepresent the characteristics of the deferred annuities they sell to older  
 12 persons. The gravamen of plaintiff's case is that CIC's deferred annuities are generally inappropriate  
 13 for people over sixty-five years of age because an older person who buys a deferred annuity is likely  
 14 to die before it fully vests. This allegedly makes such an annuity a poor investment vehicle, and  
 15 persons sixty-five and older would not buy these annuities if CIC adequately disclosed the terms of  
 16 the annuities before purchase. In the operative complaint, plaintiff also alleges that defendants  
 17 failed to disclose their precarious financial position and the questionable value of their underlying  
 18 investments, which made the purchase of an annuity more risky and less valuable than a treasury  
 19 bond.

20 Plaintiff alleges that CIC is part of the same family of companies as Consecos, Consecos  
 21 Services, Consecos Marketing and 40/86. Consecos is a holding company that allegedly conducts all  
 22 of its operations through its subsidiaries. Consecos is the parent company of which CIC, Consecos  
 23 Services, Consecos Marketing and 40/86 are all direct or indirect subsidiaries. CIC is a subsidiary of  
 24 Washington National Insurance Company; Washington National Insurance Company is in turn a  
 25 subsidiary of Consecos. Consecos Services, Consecos Marketing and 40/86 are direct subsidiaries of  
 26 Consecos. SAC ¶ 13.

## 27 28 II. ANALYSIS

**A. Motion to Dismiss for Lack of Jurisdiction**

When the instant motion to dismiss was originally filed, all Moving Defendants moved for dismissal for lack of personal jurisdiction. Consecro Marketing and Consecro Services subsequently dropped their objection to personal jurisdiction over them, however, Consecro and 40/86 continue to assert that plaintiff does not have personal jurisdiction over them.

When a defendant challenges the sufficiency of personal jurisdiction, the plaintiff bears the burden of establishing that the exercise of jurisdiction is proper. *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1194 (9th Cir. 1988). When a district court rules on a motion to dismiss for lack of personal jurisdiction without holding an evidentiary hearing, the plaintiff need only make a *prima facie* showing of the jurisdictional facts to withstand the motion. *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001). In order to make a *prima facie* showing, plaintiff must allege facts which, if true, would be sufficient to establish personal jurisdiction. *Id.* If not directly controverted, plaintiffs' version of the facts is taken as true for the purposes of the motion. *Id.* Conflicts between the facts stated in the parties' affidavits must be resolved in plaintiff's favor during a *prima facie* jurisdictional analysis. *Dole Food Co. v. Watts*, 303 F.3d 1104, 1108 (9th Cir. 2002); *Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000); *AT&T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996).

**1. RICO Statute**

In the SAC, plaintiff asserts that personal jurisdiction is proper under the provisions in the RICO statute authorizing nationwide service of process, 18 U.S.C. § 1965(b). Section 1965(b) provides that in a civil action under RICO:

in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

"Congress intended the 'ends of justice' provision to enable plaintiffs to bring all members of a nationwide RICO conspiracy before a court in a single trial." *Butcher's Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 539 (9th Cir. 1986). However, "[t]he right to nationwide service in RICO suits is not unlimited" and "merely naming persons in a RICO complaint does not, in itself, make them subject to section 1965(b)'s nationwide service provisions." *Id.* *Butcher's Union* held that

1 under section 1965(b) "the court must have personal jurisdiction over at least one of the participants  
2 in the alleged multidistrict conspiracy and the plaintiff must show that there is no other district in  
3 which a court will have personal jurisdiction over all of the alleged coconspirators." *Id.* at 538.

4 Plaintiff contends that the Ninth Circuit *Butcher's Union* decision notwithstanding, the court  
5 need only find that it has personal jurisdiction over one of the alleged participants in the alleged  
6 multidistrict conspiracy in order to exercise nationwide jurisdiction under section 1965(b). He  
7 contends that under the facts of *Butcher's Union*, the court found only that the defendants had  
8 alleged four separate conspiracies rather than one conspiracy in order to determine that section  
9 1965(b) did not confer jurisdiction – the court did not actually reach the question of whether there  
10 was "no other district in which a court will have personal jurisdiction over all of the alleged  
11 coconspirators."

12 Pointing out the fact that *Butcher's Union* was decided in 1986, plaintiff cites to more recent  
13 cases to argue that the Ninth Circuit's "no other district" requirement for nationwide service is not  
14 justified. Most persuasive is *Cory v. Aztec Steel Bldg., Inc.*, 468 F.3d 1226 (10th Cir. 2006), in  
15 which the Tenth Circuit reviewed a case in which the Kansas district court had determined it did not  
16 have personal jurisdiction over all defendants under section 1965(b) because all defendants were  
17 subject to suit in another venue, Pennsylvania. The Tenth Circuit reversed the district court, holding  
18 that "the 'ends of justice' analysis is not controlled by the fact that all defendants may be amenable to  
19 suit in one forum." *Id.* at 1232. In so holding, the court stated, "we disagree with the Ninth Circuit,  
20 which reached the contrary conclusion by inadequately considering the congressional intent  
21 underlying RICO and by ignoring federal antitrust legislation." *Id.*

22 Although the Tenth Circuit's reasoning in *Cory* that the RICO statute permits nationwide  
23 service of process where a court has personal jurisdiction over one of the alleged co-conspirators in  
24 a nationwide conspiracy is persuasive, the court has an obligation to apply Ninth Circuit precedent  
25 which has been followed within the circuit. *See, e.g., Rocawear Licensing LLC v. Pacesetter*  
26 *Apparel Group*, 2007 WL 5289737 \*5 (C.D. Cal 2007). Plaintiff's argument that *Butcher's Union*  
27 did not reach the question of whether a RICO claim could be brought in any district having  
28 jurisdiction over any defendant if there was another district which has jurisdiction over all the

defendants is refuted by the language in *Butcher's Union*. Therefore, the court concludes that jurisdiction over Conseco and 40/86 cannot be based upon Section 165(b). Even if jurisdiction is not available under this statute, there are other potential bases for jurisdiction that must be analyzed.

## 2. Specific Jurisdiction

In the Ninth Circuit, specific jurisdiction is analyzed under a three-prong test: (1) the defendant must purposefully direct its activities or consummate some transaction with the forum state or a resident of the forum state, (2) the claim alleged is one that arises out of or relates to the defendant's forum contacts, and (3) the exercise of jurisdiction must comport with fair play and substantial justice. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). The plaintiff bears the burden of establishing the first and second prongs, after which the burden shifts to the defendant to "'present a compelling case' that the exercise of jurisdiction would not be reasonable." *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78 (1985)). The first prong requires purposeful availment. This prong may be satisfied by showing purposeful availment of the privilege of doing business in the forum on the part of the defendant, purposeful direction by the defendant of activities at the forum, or a combination thereof. *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006).

Plaintiff contends that the court has personal jurisdiction over Conseco and 40/86 by virtue of their relationships with CIC. It does not appear to be disputed that Conseco is the grandparent of CIC – Conseco is the parent of Washington National Insurance Company which is the parent of CIC. It is also undisputed that Conseco is the parent of 40/86. The parent-subsidary relationship itself is not sufficient to attribute the contacts of the subsidiary to the parent for jurisdictional purposes. *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements, Ltd.*, 328 F.3d 1122, 1134 (9th Cir. 2003) (citing *Doe v. Unocal Corp.*, 248 F.3d 915, 925 (9th Cir. 2001)). An exception to this general rule occurs when the subsidiary is the alter ego or agent of the parent. *See Unocal Corp.*, 248 F.3d 915, 925 (9th Cir. 2001) ("if the parent and subsidiary are not really separate entities, or one acts as an agent of the other, the local subsidiary's contacts with the forum may be imputed to the foreign parent corporation") (quoting *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 676 (D.C. Cir. 1996)).

**a. Alter Ego**

To establish that the subsidiary is the alter ego of the parent corporation, the plaintiffs "must make out a prima facie case '(1) that there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate identities] would result in fraud or injustice.'" *Harris Rutsky*, 328 F.3d at 1134 (quoting *Unocal*, 248 F.3d at 926).

Plaintiff asserts that CIC is the alter ego of Conseco such that CIC's contacts should be imputed to Conseco. This argument has little merit. Plaintiff alleges that Conseco is the grandparent of CIC – Conseco is the parent of Washington National Insurance Company which is the parent of CIC – but that "the evidence shows that all of the defendants operated together as a single business entity known publicly as 'Conseco'" and because Conseco "principally relied upon [CIC] to market and distribute Conseco deferred annuity products." Opp'n at 9. In support of this argument, plaintiff points to the Annual Report, Form 10-K filed by Conseco on March 28, 2008, which lists the three primary operating segments of Conseco as: Banker's Life, Colonial Penn and CIC. *See* Declaration of Phong Tran ("Tran Decl."), Ex. 3. This citation alone does not suggest that there is such unity of interest between CIC and Conseco that the separate personalities of those two companies should not be recognized. As is clear from the Annual Report Conseco has a much broader base of interest and operations than CIC such that the imposition of personal jurisdiction based on an alter ego theory is inappropriate.

To bolster its alter ego argument, plaintiff also asserts that Conseco and CIC share the same headquarters address. Tran Decl., Ex. 2, Dep. of Karl Kindig ("Kindig Dep.") at 149:6-150:5; *id.* Ex. 5 at 3. In addition, plaintiff alleges that several of the officers of Conseco are directors of CIC and of 40/86, providing the following examples:

Officer	Position at Conseco	Position at CIC
Eugene Bullis	CFO	Director
Karl Kindig	Assistant Secretary	Secretary
Joseph Murphy	SVP and Treasurer	Treasurer
Christopher Nickele	EVP of Product Development	Director



Tran Decl., Ex. 2 at 79:6-83:15; 89:14-98:8; 143:2-146:13. However, "it is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts." *United States v. Bestfoods*, 524 U.S. 51, 69 (1998). Accordingly, the sharing of officers and directors between the companies is not alone sufficient to demonstrate that Consecro is an alter ego of CIC.

Finally, plaintiff contends that Consecro's designated 30(b)(6) representative, Karl Kindig testified that Consecro plays an active role in directing annuity operations. "Appropriate parental involvement includes: 'monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures.'" *Unocal*, 248 F.3d at 926 (citing *United States v. Bestfoods*, 524 U.S. 51, 69 (1998)). By contrast, "[a]n alter ego or agency relationship is typified by parental control of the subsidiary's internal affairs or daily operations. *Id.* (citing *Kramer Motors, Inc. v. British Leyland, Ltd.*, 628 F.2d 1175, 1177 (9th Cir. 1980)). Consecro's role in CIC's operations is discussed in further detail below, but plaintiff has not submitted evidence of sufficient parental control of CIC's internal affairs or daily operations to satisfy the test for alter ego liability.

#### **b. Agency**

"The agency test is satisfied by a showing that the subsidiary functions as the parent corporation's representative in that it performs services that are 'sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services.'" *Unocal*, 248 F.3d at 928 (quoting *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1405 (9th Cir. 1994)). Plaintiff asserts that the agency test is satisfied as to Consecro and 40/86 with respect to the sale of annuities by CIC.

The Consecro Annual Report for March 28, 2008 discussed above states that CIC is one of Consecro's "three primary operating segments." Tran Decl. Ex. 5 at 3. Plaintiff alleges that Consecro and its direct and indirect subsidiaries including CIC and 40/86 are together known as the "Consecro Group." He sets forth each of defendants' roles: Consecro "conducts business planning and financial reporting and analysis for members of the Consecro Group"; "Consecro Services provides Defendants with accounting, tax, marketing, actuarial services, asset management, legal, underwriting,



1 policyholder services, regulatory compliance, data processing and other functional support services";  
 2 "Conseco Marketing provides administrative and marketing services to Defendants arising out of  
 3 their agent relationships"; and "40/86 Advisors, Inc. serves as the chair of the asset/liability  
 4 committee, which is responsible for, among other things, crediting CIC's interest rates and  
 5 monitoring its option hedging program for equity indexed annuities." SAC ¶¶ 13-17.

6 As permitted on a motion to dismiss for lack of jurisdiction, plaintiff further presents  
 7 evidence that Conseco took a role in directing annuity operations. For example, Karl Kindig  
 8 testified that Christopher Nikele, an executive vice president and chief actuary of Conseco, oversaw  
 9 product development and consulted with officers and employees of CIC regarding new annuity  
 10 products. Kindig Dep. at 91:12-93:10. Plaintiff also presents evidence that, in addition to sharing  
 11 officers, Conseco, the other Moving Defendants and CIC share the same administrative and  
 12 operational infrastructure, including the same network systems, accounting and human resources  
 13 departments. Together, this evidence, however, does not establish an agency relationship between  
 14 Conseco and CIC. Further, given that Conseco is essentially a holding company, the record does not  
 15 establish that CIC is engaged in activities that Conseco would perform itself. *See Sonora Diamond*  
 16 *Corp. v. Superior Court*, 83 Cal.App. 4th 523, 543 (2000).

17 The nature of the control exercised by the parent over the subsidiary  
 18 necessary to put the subsidiary in an agency relationship with the parent must be over  
 19 and above that to be expected as an incident of the parent's ownership of the  
 20 subsidiary and must reflect the parent's purposeful disregard of the subsidiary's  
 21 independent corporate existence. The parent's general executive control over the  
 22 subsidiary is not enough; rather there must be a strong showing beyond simply facts  
 evidencing the broad oversight typically indicated by the common ownership and  
 common directorship present in a normal parent-subsidiary relationship. As a  
 practical matter, the parent must be shown to have moved beyond the establishment  
 of general policy and direction for the subsidiary and in effect taken over  
 performance of the subsidiary's day-to-day operations in carrying out that policy.

23 *Id.* at 542 (internal citations and quotations omitted).

24 The evidence plaintiff presents with regard to Conseco Marketing, Conseco Services, and  
 25 40/86<sup>3</sup> with respect to shared operational facilities is the same as that presented with respect to the  
 26 Conseco/CIC relationship. Further, 40/86 has investment advisory agreements with CIC, Conseco

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28 <sup>3</sup> This evidence is in addition to the allegations set forth above regarding each Moving Defendant's  
 role in marketing or providing other support for CIC's annuity sales activities.

1 and other entities affiliated with Conseco under which 40/86 manages these companies' assets. With  
2 respect to CIC, 40/86 invests the premium amounts paid by annuity purchasers. These facts are  
3 insufficient to show an agency relationship which gives rise to personal jurisdiction over 40/86. It is  
4 difficult to see how CIC could be an agent of 40/86 which would be necessary to impute CIC's acts  
5 to 40/86 for jurisdictional purposes. Further, the relationship between CIC and 40/86 does not have  
6 the characteristics necessary to meet *Sonora Diamond* test.

7 **B. Statute of Limitations**

8 Hansen filed his first complaint against CIC in 2005, but did not add claims against the  
9 Moving Defendants until April 27, 2007 when he filed the SAC. The parties first dispute whether  
10 the claims against the Moving Defendants relate back to the original filing of the complaint. Rule  
11 15(c)(3) permits relation back if new defendants have had notice of the pending claims against them.  
12 The court finds that plaintiff has presented sufficient facts to demonstrate that the Moving  
13 Defendants are sufficiently related in their business activities that they would have been on notice as  
14 to which of plaintiff's claims involved allegations involving their aspect of the business.

15 All Moving Defendants contend that each of plaintiff's claims against them, which are  
16 subject to a two-, three- or four-year statute of limitation, is time-barred. First, Moving Defendants  
17 assert that any applicable statute of limitations began running in 2002 when, as alleged by plaintiff, a  
18 Wall Street Journal exposé "documented the abusive sales tactics of Broker's Choice [allegedly a  
19 'long time top-producer for CIC'] directed at senior citizens." SAC ¶ 25. The court finds this  
20 argument to be without merit. There is no allegation that plaintiff ever read this exposé and, even  
21 assuming he had, it is unclear how he would have inferred that the abusive sales tactics of Broker's  
22 Choice toward senior citizens would be connected to the sale of the CIC annuity to him.

23 Moving Defendants also assert that any applicable statute of limitations began to run in 2000  
24 when plaintiff purchased the CIC annuity. Plaintiff, on the other hand, asserts that it did not begin to  
25 run until 2004 when plaintiff sold the annuity, incurring substantial penalties for early surrender of  
26 the annuity. The court has previously considered this argument with respect to CIC and concluded  
27 that the statute of limitations does not necessarily bar any of the claims against CIC. Moving  
28

Defendants do not present any new argument directed to the statute of limitations for this claim that would convince the court to revisit this ruling.

**a. Discovery Rule**

Plaintiff renews his argument that the statute of limitations should be tolled under the discovery rule. Generally, California law allows tolling of the statute of limitations under the discovery rule; that is, "the statute of limitations does not begin to run until the plaintiff discovered or had notice of all facts which are essential to the cause of action." *Saliter v. Pierce Bros. Mortuaries*, 81 Cal. App. 3d 292, 296 (1978). The rationale behind this exception is that statutes of limitations "should not be interpreted so as to bar a victim of wrongful conduct from asserting a cause of action before he could reasonably be expected to discover its existence." *Id.* at 297. "In order to invoke this special defense to the statute of limitations, the plaintiff must specifically plead facts which show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence." *Id.* "Resolution of a statute of limitations defense normally is a factual question for the trier of fact." *City of San Diego v. U.S. Gypsum Co.*, 30 Cal. App. 4th 575, 582 (1994). However, "[m]ere conclusory assertions that delay in discovery was reasonable are insufficient." *Saliter*, 81 Cal. App. 3d at 297.

Plaintiff adequately invokes the discovery rule. He alleges that material misrepresentations about the risks inherent in his CIC annuity were made to him. SAC ¶¶ 90, 95, 96, 101. Defendants, through the marketing material provided by Zehner, represented that the annuities provided the benefits of the stock market without the downside risk, thus discouraging plaintiff from comparing the performance of his investment with other available investments. *Id.* at 90. Plaintiff also alleges that he was not told, nor had any way of knowing, that his annuity, sold and marketed as a "single premium annuity" (for which plaintiff paid a single premium), had cash surrender values calculated on a "flexible premium" model, which allegedly resulted in lower initial cash surrender values on the annuity plaintiff purchased. SAC ¶ 101. According to plaintiff, this could not have been discovered by a reasonable person until after the annuity had been sold and the penalties accrued. Plaintiff argues that disclosures were was drafted in indecipherable and opaque mathematical terms in the materials provided. The court agrees that these allegations are sufficient to warrant application of

1 the discovery rule.

2 **b. Fraudulent Concealment**

3 Moving Defendants also challenge whether plaintiff has successfully invoked the fraudulent  
 4 concealment doctrine. "A defendant's fraud in concealing a cause of action against him will toll the  
 5 statute of limitations, and that tolling will last as long as a plaintiff's reliance on the  
 6 misrepresentations is reasonable." *Grisham v. Philip Morris U.S.A., Inc.*, 40 Cal. 4th 623, 744  
 7 (2007). "[T]he fraudulent concealment by the defendant of a cause of action tolls the relevant statute  
 8 of limitations, which does not begin to run until the aggrieved party discovers the existence of the  
 9 cause of action." *Community Case v. Boatwright*, 124 Cal. App. 3d 888, 899 (1981). However,  
 10 "[w]hen a plaintiff alleges the fraudulent concealment of a cause of action, the same pleading and  
 11 proof is required as in fraud cases: the plaintiff must show (1) the substantive elements of fraud, and  
 12 (2) an excuse for late discovery of the facts." *Id.* at 900 (citation omitted).

13 The elements of fraud are "(a) misrepresentation (false representation, concealment, or  
 14 nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance;  
 15 (d) justifiable reliance; and (e) resulting damage." *Charnay v. Cobert*, 145 Cal. App. 4th 170, 184  
 16 (2006). "As for the belated discovery, the complaint must allege (1) when the fraud was discovered;  
 17 (2) the circumstances under which it was discovered; and (3) that the plaintiff was not at fault for  
 18 failing to discover it or had no actual or presumptive knowledge of facts sufficient to put him on  
 19 inquiry." *Boatwright*, 124 Cal. App. 3d at 900.

20 In ruling on CIC's earlier motion to dismiss, the court held that plaintiff's allegations  
 21 regarding fraudulent concealment were sufficient to support tolling the statute of limitations under  
 22 the fraudulent concealment doctrine. Moving Defendants' additional argument is that plaintiff's  
 23 complaint merely refers to defendants as an undifferentiated mass and does not provide sufficient  
 24 notice as to what particular statements are allegedly false or what knowledge any of the defendants  
 25 may have had. It is true that plaintiff's factual allegations regarding the undisclosed and false  
 26 statements about the CIC annuity's performance, costs, teaser rates and subsidies, cash surrender  
 27 values, liquidity and investment safety are attributed generally to "defendants" rather than allocated  
 28 individually to any particular Moving Defendant. *See* SAC ¶¶ 52-85. Nevertheless, plaintiff's

complaint also sets forth allegations detailing each of the Moving Defendant's alleged role in the "Conseco Group" and their involvement with one another. *Id.* ¶¶ 14 (Conseco "conducts business planning and financial reporting and analysis for members of the Conseco Group"); 16 ("Conseco Services provides Defendants with accounting, tax, marketing, actuarial services, asset management, legal, underwriting, policyholder services, regulatory compliance, data processing and other functional support services. Conseco Marketing provides administrative and marketing services to Defendants arising out of their agent relationships"); 17 ("40/86 Advisors, Inc. serves as the chair of the asset/liability committee, which is responsible for, among other things, crediting CIC's interest rates and monitoring its option hedging program for equity indexed annuities."). Viewing plaintiff's allegations pertaining to the misrepresentations and omissions in light of the allegations regarding the Moving Defendants' roles, the court finds that plaintiff has alleged sufficient facts with sufficient particularity to invoke the fraudulent concealment doctrine.

### C. Arguments for Dismissal Specific Claims for Relief

Moving Defendants also challenge three of plaintiff's claims under Rule 12(b)(6): plaintiff's RICO claim, breach of the duty of good faith and fair dealing claim and unjust enrichment claim

#### 1. RICO

Plaintiff's first and second causes of action are for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), specifically 18 U.S.C. § 1962(c) and (d). "The elements of a civil RICO claim are as follows: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as 'predicate acts') (5) causing injury to plaintiff's business or property." *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005).

Moving Defendants appear to challenge plaintiff's RICO claim on the grounds the plaintiff has failed to plead an enterprise because the enterprise allegations state only that each Moving Defendant was engaged in its own business operations. In *Odom v. Microsoft Corp.*, 486 F.3d 541 (9th Cir. 2006), the Ninth Circuit expressly overruled prior caselaw and held that "an associated-in-fact enterprise under RICO does not require any particular organizational structure, separate or otherwise." *Odom*, 486 F.3d at 550-51. In *Odom*, the Ninth Circuit clarified that courts

1 should return to the principles articulated by the Supreme Court in *United States v. Turkette*, 452  
 2 U.S. 576 (1981), to determine whether a plaintiff alleges the existence of an enterprise. *Odom*, 486  
 3 F.3d at 552 (an associated-in-fact enterprise is a "group of persons associated together for a common  
 4 purpose of engaging in a course of conduct," for which "a plaintiff must provide both 'evidence of an  
 5 ongoing organization, formal or informal,' and 'evidence that the various associates function as a  
 6 continuing unit.'").

7 As discussed above, plaintiff has alleged a direct and indirect subsidiary relationship  
 8 between Conseco, CIC, Conseco Marketing, Conseco Services and 40/86, thereby successfully  
 9 alleging an ongoing organization. Plaintiff has also made allegations regarding how the Conseco  
 10 Group operates to facilitate defendants' alleged fraudulent scheme, alleging a common purpose, and  
 11 that the alleged improprieties regarding the sale of annuities to seniors continues over time satisfying  
 12 the requirement that plaintiff make sufficient allegations that the enterprise is a continuing unit.  
 13 SAC ¶¶ 12-18, 22-38, 49-51, 119-124.

## 14 **2. Breach of the Duty of Good Faith and Fair Dealing**

15 Plaintiff asserts that Moving Defendants are liable for breach of the duty of good faith and  
 16 fair dealing under Cal. Ins. Code § 785 and Cal. Ins. Code § 332. Cal Ins. Code § 785 provides "All  
 17 insurers, brokers, agents, and others engaged in the transaction of insurance owe a prospective  
 18 insured who is 65 years of age or older, a duty of honesty, good faith, and fair dealing." Cal Ins.  
 19 Code § 332 provides "Each party to a contract of insurance shall communicate to the other, in good  
 20 faith, all facts within his knowledge which are or which he believes to be material to the contract and  
 21 as to which he makes no warranty, and which the other has not the means of ascertaining."

22 Plaintiff argues that the language of Cal. Ins. Code § 785 "others engaged in the transaction  
 23 of insurance" is broad enough to include Moving Defendants because they "clearly engage in the  
 24 transaction of insurance." This allegation along with the description in the complaint as to the  
 25 business activities of the defendants is sufficient to get by a motion to dismiss. Because Moving  
 26 Defendants' argument that plaintiff cannot state a claim for unjust enrichment is based primarily on  
 27 the argument that there is no relationship sufficient to sustain such a claim, the court declines to  
 28 dismiss plaintiff's unjust enrichment claim for the same reason. Plaintiff does not, however, state a

1 claim under Cal. Ins. Code § 332, as plaintiff has not shown that any of the Moving Defendants was  
2 a party to the annuity.

3 **III. ORDER**

4 For the foregoing reasons, Moving Defendants' motion to dismiss Consecro and 40/86 for  
5 lack of personal jurisdiction is granted. Moving Defendants' motion to dismiss for failure to state a  
6 claim is denied as to all claims except plaintiff's claims for breach of fiduciary duty and aiding and  
7 abetting breach of fiduciary duty. Those claims are dismissed with prejudice.

8  
9 DATED: 9/30/2008



RONALD M. WHYTE  
United States District Judge



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**Dated:** 9/30/2008

TSF  
**Chambers of Judge Whyte**